89-2005

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOYCE CARLE,

PETITIONER,

VS.

L.F. WOODS, POSTMASTER,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DONALD W. DAVIS
1732 N.E. 36TH ST.
OKLAHOMA CITY, OKLAHOMA 73111
(405) 427-8386
COUNSEL OF RECORD

LEWIS BARBER, JR.
1528 N.E. 23RD, SUITE 410
OKLAHOMA CITY, OKLAHOMA 73111
(405) 424-5201

ATTORNEYS FOR PETITIONER

QUESTION PRESENTED

Whether the admission of the United States Attorney, that he received proper service of an action naming the local postmaster as defendant, was sufficient notice to the Postmaster General to bring Petitioner within the identity of interests and relation back exceptions of Rule 15(c) and Schiavone v. Fortune, 477 U.S. 21 (1986).

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TABLE OF AUTHORITIES

OPINIONS BELOW

The United States District Court for the Western District of Oklahoma rendered its decision on July 7, 1989, dismissing Carle's complaint. Appeal was taken in the United States Court of Appeals for the Tenth Circuit and on March 22, 1990, the Appeals Court affirmed the decision of the District Court. Both opinions are contained herein as Appendix "A" and "B", respectively.

STATEMENT OF JURISDICTION

The date of the judgment sought to be reviewed is March 22, 1990. The court for which relief is sought is the United States Court of Appeals for the Tenth Circuit. This court has jurisdiction to review this appeal pursuant to 28 United States Code Section 1254.

The rule which this case involves is Rule 15(c) of the Federal Rules of Civil Procedure which provides:

"(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on

the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant."

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance was Title 42 United States Code § 2000e-16.

This appeal arises as the result of a lengthy series of reprisal incidents which Respondent/Appellee, Postmaster (hereinafter "Respondent" or "Postmaster") initiated against Petitioner/Appellant, Joyce Carle (hereinafter "Carle" or "Petitioner"). Carle was appointed as a clerk-stenographer in the Norman, Oklahoma post office on November 25, 1972. Carle entered into a settlement agreement with Respondent, which Carle alleged that Respondent failed to honor; and, Carle then filed a complaint with the Equal Employment Opportunity Commission on that basis. Carle received a final decision

from EEOC on August 18, 1987, which denied her claim of discrimination. Pursuant to 42 U.S.C. § 2000e-16(c), Carle had thirty (30) days (September 17, 1987) to file a civil action against the agency.

Carle filed her complaint, pro se, on September 14, 1987, stating that she had been discriminated against on the basis of reprisal for testifying in a previous court case. The complaint named L.F. Woods, Postmaster, U.S. Post Office, Norman, Oklahoma, as defendant, who was served on September 16, 1987, instead of Preston R. Tisch, Postmaster General of the United States Postal Service; however, Carle served the United States Attorney, Oklahoma City, Oklahoma, on September 22, 1987. Subsequently the United States Attorney filed a motion to

dismiss on three grounds: 1) that Carle failed to state a claim; 2) that Carle did not properly invoke the jurisdiction of the court; and, 3) that Carle failed to name the proper defendant.

The trial court disposed of the matter on the ground that Carle failed to name the proper defendant within the limitations period. The Tenth Circuit Court of Appeals concluded in error that Carle failed to serve the United States Attorney (Order and Judgment, p. 9); but Carle did timely serve the United States Attorney.

Neither the trial court nor the Appeals Court acknowledged the fact that the United States Attorney had been timely and properly served, which fact was admitted by the United States Attorney and documented by the clerk (see

entry number 5 of the "Record on Appeal").

ARGUMENT

THE UNITED STATES ATTORNEY'S ADMISSION THAT HE RECEIVED PROPER NOTICE OF THE ACTION WITHIN THE LIMITATIONS PERIOD IS SUFFICIENT NOTICE UNDER SCHIAVONE V. FORTUNE AND RULE 15(C) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The narrow issue that this court must decide is whether the Postmaster General was given notice of a pending suit within the period of limitations. There is conflict among the circuits concerning this issue and Petitioner respectfully urges this Court to provide guidance in this matter.

This Court held that in determining whether an amendment may relate back to the original date of filing, the key consideration is "notice and notice within the limitations period."

Schiavone v. Fortune, 477 U.S. 21, 106 S.Ct. 2379, 2384 (1986).

As persuasive authority, Petitioner offers Montgomery v. United States Postal Service, 867 F.2d 900 (1989), wherein the Fifth Circuit recanted "the relation back of an amended complaint substituting a different defendant is governed by Rule 15(c)." The Montgomery court then concluded that "by its terms, Rule 15(c) states that notice to the United States Attorney within the limitations period is sufficient to preserve an action against a United States agency or officer... Thus, notice to the U.S. Attorney is notice to the Postmaster General." Id. at 903.

Also of great import, in determining whether the Postmaster General had notice is that the United States Attorney now

defends this action on behalf of Woods; and had Carle named the Postmaster General in her original complaint, the United States Attorney would nonetheless be required to defend the matter. In either event, the same entity is called upon to defend the matter. Further, by virtue of responding to this action, it is evident that the United States Attorney received sufficient notice and determined that Woods was not the proper party to defend the lawsuit. It logically follows that the fact that the United States Attorney had knowledge of the improper party, necessarily meant that he had notice of the proper party and thus satisfies the third element of Schiavone.

Thus, Carle advances the rationale of the Montgomery court wherein it

reasoned "in acknowledging Montgomery's attempt at service of the complaint, the U.S. Attorney had to know that Montgomery intended to bring the action against the postal authority... Notice of the suit and knowledge that the Postmaster General was a potential defendant would occur simultaneously." Montgomery, 867 F. 2d at 904.

In the instant case, Respondent acknowledged that proper service was made on the United States Attorney's office. However, neither the District Court nor the Appeals Court responded to that admission. Moreover, Respondent reemphasized his position in Footnote 6, Page 11 of his Brief in Support of Motion to Dismiss wherein he states "personal service was made on the United States Attorney in Oklahoma City, but to our

knowledge no copy of the Complaint and Summons was mailed to the Attorney General in Washington." From that admission, it is clear that the United States Attorney had notice of the action within the limitations period. To come within the Schiavone, exception, "the linchpin is notice, and notice within the limitations period." Schiavone, 477 U.S. 21, 106 S.Ct. at 2385. Carle contends that this admission demonstrates that the United States Attorney had notice within the limitations period, and that such notice brings her within the scope of Rule 15(c).

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, as premise considered, Petitioner prays that this Court grant her petition for Writ of Certiorari.

Respectfully submitted,

DONALD W. DAVIS
1732 N.E. 36th
Oklahoma City, OK 73111
(405) 427-8386

LEWIS BARBER, JR.
1528 N.E. 23rd, Suite 410
Oklahoma City, OK 73111
(405) 424-5201

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 1990, 3 copies each of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, to the following:

The Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2000
Attorney for Respondent

and

Timothy Leonard
United States Attorney
Steven K. Mullins
Assistant United States Attorney
4434 U.S. Courthouse
200 N.W. 4th
Oklahoma City, OK 73102
(405) 231-5281
Attorney for Respondent

and

Robert P. Sinderman, Jr.
U.S. Postal Service
Office of Labor Law
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1133
(202) 268-3043
Attorney for Respondent

DONALD W. DAVIS

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOYCE CARLE,

PETITIONER,

VS.

L.F. WOODS, POSTMASTER,

RESPONDENT.

PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AFFIDAVIT OF MAILING

This Petition for Writ of Certiorari was mailed, first class, postage prepaid and correctly addressed to the Clerk of the Supreme Court of the United States,

on June 20, 1990 from the Main Post Office, 320 S.W. 5th St., Oklahoma City, Oklahoma 73102.

Donald W. Davis
1732 N.E. 36th
Oklahoma City, OK 73111
(405) 427-8386

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

Subscribed and sworn to before me this 20th day of June, 1990.

Notary Public

My Commission Expires:
October 13, 1990

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JOYCE CARLE, Plaintiff, vs. L.F. WOODS, Postmaster, U.S. POST OFFICE, Norman, OK 73070-9998, Defendant.	)	No. CIV-87-1871-W

ORDER

This matter comes on before the Court on Motion of Defendant to Dismiss. The action involves a discrimination claim by Plaintiff under 42 U.S.C. §§ 2000e, et seq. Said statute provides in pertinent part that a plaintiff must bring a civil action within thirty days of a final decision by the Equal Employment Opportunity Commission (EEOC). In the present case Defendant asserts that Plaintiff failed to name the proper

party within the thirty-day limitations period and that an amended complaint naming the proper party cannot relate back. This Court agrees and grants Defendant's Motion to Dismiss.

On August 18, 1987, Plaintiff received a final decision by the EEOC, denying Plaintiff's claim of discrimination.[1] Pursuant to 42 U.S.C. § 2000e-16(c), Plaintiff had thirty days within which to file a civil action against the head of the governmental agency. For proper filing in this case, Plaintiff should have filed a complaint

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[1] A copy of the EEOC decision was attached to the judicial complaint in the instant action. On the top right hand corner of the EEOC decision, a handwritten notation states "Received 8-18-87 J. Carle." Defendant refers to this notation as indicating the date of receipt by Plaintiff. Brief in Support of Defendant's Motion to Dismiss, p. 10. In response, Plaintiff does not dispute the date of receipt.

against Preston R. Tisch, Postmaster General of the United States Postal Service, by September 17, 1987. Instead, the record indicates that Plaintiff filed and served the following:

> (1) On September 14, 1987, Plaintiff filed a complaint with this Court naming the Defendant as L.F. Woods,Post Master, United States Post Office, Norman, Ok. Service was effected on September 16, 1987.[2]
>
> (2) On September 22, 1987, Plaintiff filed a summons for United States Postal Service, Postmaster General Preston R.

---

[2] By affidavit filed with this Court, L.F. Woods deposes that he received a summons in the captioned matter on September 16, 1987, without a complaint attached. Plaintiff does not controvert this affidavit in subsequent response.

Tisch. Service was effected on September 28, 1987.

(3) On September 22, 1987, Plaintiff filed a summons to Edwin Meese [with the appropriate Washington, D.C. address]. Service was effected on September 28, 1987.

(4) On September 30, 1987, Plaintiff filed a summons for the Attorney General [with the appropriate Washington, D.C. address]. Service was effected on October 5, 1987.

(5) On September 30, 1987, Plaintiff filed a summons for the United States Attorney [with the appropriate Oklahoma City address]. Service was effected on October 2, 1987.

It is clear from the record that the

local postmaster, L.F. Woods, was the only person who had any notice regarding a lawsuit within the thirty-day limitations period.[3] It is equally clear that the local postmaster in Norman, Oklahoma, L.F. Woods, is not the proper party to this lawsuit. Title 42 U.S.C. § 2000e-16(c) states that the only proper defendant to a discrimination suit is the head of the governmental agency, department or unit. Abundant case law interprets the statute to mean exactly what it says regarding the proper defendant in such cases. See Johnson v. United States Postal Service, 861 F.2d 1475, 1478 (10th Cir. 1988); Canino v. United States AC, 707 F.2d 468, 472 (11th Cir. 1983); Hall v. Small Business

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[3] The notice L.F. Woods received was defective because he received a summons only without benefit of an accompanying complaint.

Administration, 695 F.2d 175, 180 (5th Cir. 1983); Davis v. Califano, 613 F.2d 957, 958 n.1 (D.C. Cir. 1980, as amended); Hakley v. Roudebush, 520 F.2d 108, 115 n.17 (D.C. Cir. 1975); Drayton v. Veterans Administration, 654 F. Supp. 558, 562 (S.D.N.Y. 1987); Brooks v. Brinegar, 391 F.Supp. 710, 711 (W.D. Okla. 1974); and Carle v. United States Postal Service, et al, No. CIV-86-1297-W, 13-14 (W.D. Okla. December 31, 1986). The last case cited, Carle v. United States Postal Service, supra, serves a dual function. Not only does case law support a plain reading of the statute, but the Plaintiff in this action previously had been subjected to a dismissal by this Court for failure to comply with the requirement to name the proper party within the thirty-day

limitations period for a discrimination claim. Thus, Plaintiff herein had notice of said statute by virtue of an adverse court order issued against Plaintiff. In addition, the EEOC's final Decision issued to Plaintiff herein contained a notice statement, filed with this Court in the present action by Plaintiff herself, which stated in pertinent part:

> "You are further notified that if you file a civil action, YOU MUST NAME THE APPROPRIATE OFFICIAL AGENCY OR DEPARTMENT HEAD AS THE DEFENDANT. Rule 25(d)(2) of the Federal Rules of Civil Procedure provides that you may describe the defendant by official title rather than by name. Failure to provide the NAME OR OFFICIAL TITLE of the agency head or, where appropriate, the department head, may result in the loss of any judicial redress to which you may be entitled. (Please note: For this purpose, Department means the overall national organization, such as the now defunct Department of Health, Education and Welfare, not the local administrative department where you work.) You must be sure that the proper defendant is named

when you file your civil action." (emphasis in the original)

Nevertheless, Plaintiff herein filed a lawsuit naming the local postmaster, L.F. Woods, as the only defendant in the present lawsuit. Accordingly, the Court must now answer the following two questions. First, will the facts of this case allow an amended complaint naming the proper party to relate back to the original complaint? Second, do the facts of this case warrant an equitable tolling of the limitations period? The Court answers both questions in the negative.

Rule 15(c) of the Federal Rules of Civil Procedure sets forth the conditions by which an amendment may relate back to the date of the original pleading. Subsection (c) of said Rule 15 provides:

Whenever the claim or defense

asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

In Schiavone v. Fortune, 477 U.S. 21

(1986), the Supreme Court of the United States clarified Rule 15(c) of the Federal Rules of Civil Procedure regarding relation back. The Supreme Court stated:

> "Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period." Id at 29.

There is no dispute that Plaintiff herein meets the first element of the test. This Court's analysis focuses on the second, third and fourth elements.

In Schiavone, the plaintiffs timely filed a complaint within the limitations

period, but served the defendant outside the limitations period. The court found that in order for the relation back to apply under Rule 15(c) notice must be given within the limitations period. Thus, a party who files a lawsuit within the limitations period but serves the defendant outside the limitations period cannot invoke the relations back provisions of Rule 15(c). The court held this to be so, even though Rule 4(j) allows 120 days for service of process after timely filing of a lawsuit. The court stated: "We are not inclined, either, to temper the plain meaning of the language by engrafting upon in [Rule 15(c)] an extension of the limitations period equal to the asserted reasonable time, inferred from Rule 4, for the service of a timely filed complaint."

Id. at 30.

In the instant case, Plaintiff argues that the service upon the United States Attorney by Plaintiff satisfies the relation back requirement of Rule 15(c). Plaintiff cites Edwards v. United States, 755 F.2d 1155 (5th Cir. 1985) to support its position. Plaintiff misses, however, the pertinent point in the Edwards case: The United States Attorney was served within the limitations period. Plaintiff herein served the United States Attorney on October 2, 1987, fifteen days outside the limitations period. Thus, the Edwards case comports with the Schiavone ruling that notice must occur within the limitations period in order to invoke Rule 15(c). Here, the facts fail to comport with the Schiavone ruling. The

record herein indicates that the Attorney General, the Postmaster General, and the United States Attorney were served outside the limitations period, therefore precluding relation back by the clear holding of the Schiavone case.

The only person who received any notice whatsoever within the limitations period was L.F. Woods, the local postmaster. L.F. Woods received only a summons naming his as the sole defendant in a lawsuit. The summons did not indicate what kind of action was being taken against him. Thus, the question from this set of facts is whether the identity-of-interest exception within the framework of Rule 15(c) may be invoked to sufficiently impute knowledge of the discrimination claim from the local postmaster to the Postmaster General.

The Schiavone court recognized the identity-of-interest exception arguendo stating:

> "Even if we were to adopt the identity-of-interest exception, and even if Fortune properly could be named as a defendant, we would be compelled to reject petitioner's contention that the facts of this case fall within the exception. Timely filing of a complaint, and notice within the limitations period to the party named in the complaint, permit imputation of notice to a subsequently named and sufficiently related party. In this case, however, neither Fortune nor Time received notice of the filing until after the period of limitations had run. Thus, there was no proper notice to Fortune that could be imputed to Time." Id. at 29.

This Circuit has recognized the identity-of-interest exception, stating that "rule 15(c) is an explicit statement of procedures and safeguards that make up this exception." Johnson v. United States Postal Service, 861 F.2d 1475, 1481 (10th Cir. 1988). Further, this

Circuit permits the use of the identity-of-interest exception if the addition of a party who has a close identity of interest with the old party will not be prejudiced. Travelers Indemnity Co. v. United States, 382 F.2d 103, 106 (10th Cir. 1967).

This Court finds that the facts herein fail to come within the identity-of-interest exception because the Postmaster General did not have proper notice within the limitations period, one of the safeguards of Rule 15(c), and the Postmaster General would be prejudiced if this Court allowed relation back under these circumstances.

Under Rule 4, Federal Rules of Civil Procedure, service requires the mailing or delivery of the summons and a copy of the complaint. Thus, where in

the instant case L.F. Woods received a summons only, he did not receive service of process within the limitations period. He did, however, receive some notice regarding a lawsuit. This Court views said notice of a lawsuit as insufficient notice for purposes of imputing such notice to a subsequent, added party. Otherwise, under the circumstances, defective service or even rumors of personal lawsuits against branch employees of a government agency would necessitate reporting to the national head of that agency on the chance that the lawsuit turned out to be a Title VII discrimination suit against the head of the agency. In short, imputation of defective notice attenuates Rule 15(c) beyond reasonable limits.

Assuming that L.F. Woods received

proper service, giving him actual knowledge that the lawsuit was a Title VII discrimination claim, the Court would still find that the imputation of that knowledge to the Postmaster General fails to satisfy the requirements of Rule 15(c). As noted earlier, 42 U.S.C. § 2000e-16(c) specifically states that the head of the governmental agency is the proper partv to a discrimination suit. L.F. Woods is not a proper party in any circumstance of this case. Rule 15(c) imputes knowledge to the sovereign if the party would have been a proper defendant. Also in the Schiavone case, the court assumes the identity-of-interest exception under the condition that "Fortune properly could be named as a defendant. . ." Pertinent paragraph cited above. Therefore, the identity-of-

interest exception permits the imputation of notice to be passed on only by a party who could be properly named as a defendant. As stated, L.F. Woods is not a proper defendant in the instant case.

In addition, the EEOC gives explicit instructions in capital letters regarding the proper party. The Legislature as well as the agency governing discrimination claims have gone to extra lengths to plainly state the circumstances in which the sovereign may be sued. See analysis in Drayton v. Veterans Administration, supra. If this Court now allowed all discrimination claims naming only local employees to relate back, the Postmaster General would suffer prejudice by being unable to effectively predict and manage civil cases against it. Cases filed months

earlier against local employees could relate back to the Postmaster General in derogation of the specific statutory limitations period. In short, the Postmaster General could rely on 42 U.S.C. § 2000e-16(c) at its peril only. Prejudice would result.

The foregoing discussion answered the attendant questions regarding the issue of relation back. Next, the Court considers whether an equitable tolling of the limitations period is appropriate in this case.

The Tenth Circuit has recognized an equitable tolling is applicable to the limitations period in discrimination claims. Johnson v. United States, supra at 1480; Martinez v. Orr, 738 F.2d 1107, 1110 (10th Cir. 1984). In Johnson, the court stated this circuit's standard

regarding appropriate tolling:

> "Thus, in this circuit, a Title VII time limit will be tolled only if there has been 'active deception.' Mr. Johnson has not been 'actively misled' here and we also conclude that he was not 'lulled into inaction' in any way that rises to the active deception standard of our circuit's case law." (emphasis in the original) Id.at 1481.

Applying said standard to the facts of this case clearly demonstrates that equitable tolling is inappropriate. Far from being misled or lulled into inaction, Plaintiff herein previously received specific notice by court order discussing Title VII requirements concerning the failure to name the proper party within the thirty-day limitations period. Further, as cited earlier, Plaintiff had notice clearly stated in plain language that the local department was not the proper party in a discrimination claim, and that failure to

sue the head of the national agency by name or official title could result in loss of judicial redress. (These facts are clearly distinguishable from Martinez where equity recognized an ambiguity in a notice to a layman of whether an agency's response to a request for reconsideration constituted the "final" decision.)

Finally, for purposes of equitable considerations, the Court observes that the previous claim dismissed by this Court concerned allegations that Leslie Woods violated a Settlement Agreement entered into on November 29, 2984. See Complaint, para. 8, Carle v. United States Postal Service, Leslie Woods, Postmaster, CIV-86-1297-W. At least part of the dispute in that lawsuit concerned the use by Carle of an adjacent office

wherein Kerry Hampstead worked. See statement by Carle, last attachment of said complaint. The present lawsuit concerns an incident occurring in August 1984, regarding use by Carle of Kerry's private office, an adjacent office. See Status Report, dated January 6, 1988, Carle v. L.F. Woods, CIV-87-187-W. It appears that the incident triggering the present lawsuit was an integral part of the previous lawsuit.

Accordingly, Defendant's Motion to Dismiss is hereby GRANTED.

ENTERED this 17th day of July, 1989.

/s/
LEE R. WEST
UNITED STATES DISTRICT JUDGE
ENTERED IN JUDGMENT DOCKET
ON 7-17-89.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOYCE E. CARLE,	)	
	)	
Plaintiff-Appellee,	)	
	)	No. 89-6285
v.	)	(W.D.)
Oklahoma)		
	)	(D.C.
L.F. WOODS, POSTMASTER,	)	CIV-87-1871-W)
U.S. POST OFFICE,	)	
Norman, Oklahoma,	)	
	)	
Defendant-Appellant.	)	

ORDER AND JUDGMENT*[1]

Before TACHA, BALDOCK and BRORBY, Circuit Judges.

After examining the briefs and the

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[1] This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3

appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Appellant Joyce Carle appeals the order of the district court granting appellee's motion to dismiss appellant's employment discrimination claim brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

The significant facts of the case are undisputed on appeal. Appellant is a clerk-stenographer in the Norman, Oklahoma, post office. In an administrative complaint brought in accordance with the United States Postal Service's (the "Agency") administrative

Equal Employment Opportunity procedures, she alleged that on August 28, 1984, she was denied use of a door providing access to an adjacent general clerk's office and threatened with disciplinary action regarding the quality of her work. She further alleged that these actions were the result of sex discrimination and/or reprisal for a previous complaint with the Equal Employment Opportunity Commission ("EEOC"). After a hearing, the Agency issued its final decision on October 7, 1985, finding no discrimination. On October 25, 1985, appellant initiated an appeal with the EEOC, which affirmed the Agency's decision on August 17, 1987. Appellant then instituted the instant civil action.

Under 42 U.S.C. § 2000e-16(c), civil actions must be brought by a plaintiff

against the head of the appropriate governmental agency within thirty days of notice of a final decision of the EEOC. Johnson v. United States Postal Service, 861 F.2d 1475, 1478 (10th Cir. 1988), cert. denied, 110 S.Ct. 54 (1989). Appellees moved for dismissal in the district court on the ground appellant failed to name the proper party within the thirty-day period. The district court agreed and granted the motion.

The basis for a dismissal for "inability to amend a complaint naming an improper party is failure to state a claim upon which relief can be granted." Johnson, 861 F.2d at 1476 n.1. As such, our standard of review on appeal is de novo. National Commodity & Barter's Ass'n v. Gibbs, 886 F.2d 1240, 1243-44 (10th Cir. 1989).

To properly file her action, appellant should have filed her complaint against the head of the Agency, Preston R. Tisch, Postmaster General of the United States Postal Service, by September 17, 1987.[2] Instead, the district court found that appellant did the following:

> 1. On September 14, 1987, [appellant] filed a complaint with this Court naming the Defendant as L.F. Woods, Postmaster, United States Post Office, Norman, Ok. Service was effected September 16, 1987. By affidavit, L.F. Woods asserted that he received a summons on September 16, 1987, without a complaint attached. Appellant did not contest the affidavit before the district court.
>
> 2. On September 22, 1987, [appellant] filed a summons for United States Postal Service,

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[2] In the top right hand corner of the copy of the EEOC decision attached to the judicial complaint, a handwritten notation states "Received 8-18-87 J. Carle." Appellant does not dispute the date of receipt.

> Postmaster General Preston R. Tisch. Service was effected on September 28, 1987.
>
> 3. On September 22, 1987, [appellant] filed a summons to Edwin Meese [in Washington, D.C.]. Service was effected on September 28, 1987.
>
> 4. On September 30, 1987, [appellant] filed a summons for the Attorney General [in Washington, D.C.]. Service was effected on October 5, 1987.
>
> 5. On September 30, 1987, [appellant] filed a summons for the United States Attorney [in Oklahoma City]. Service was effected on October 2, 1987.

[District Court Order at 2.]

On appeal, appellant asserts that her addition of the Postmaster General as a party after the expiration of the limitations period should relate back to her original, timely complaint. Fed.R.Civ.P. 15(c) governs the relation back of amendments to pleadings. The relation back of an amendment is

dependent upon the satisfaction of four factors:

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Slade v. United States Postal Service, 875 F.2d 814, 815 (10th Cir. 1989) (quoting Schiavone v. Fortune, 477 U.S. 21, 29 (1986)). "With respect to actions brought against an agency or officer of the United States, Rule 15(c) further provides that '[t]he delivery or mailing of process to the United States Attorney ... or the Attorney General of the United States, satisfies the second and third requirements of the Schiavone test." Id.

Appellant first argues that the service made upon the United States Attorney satisfies Rule 15(c). [Appellant's brief at 5-6.] On this point, we agree with the district court that service on the United States Attorney in this case does not satisfy Rule 15(c) because the United States Attorney in this case does not satisfy Rule 15(c) because the United States Attorney was served outside the limitations period. As stated above, Rule 15(c) provides that effective service on either the United States Attorney or the Attorney General satisfies the final requirements of the Schiavone test. However, such service must be made within the limitations period. Rule 15(c); Slade, 875 F.2d at 815. For purposes of this test,

"delivery or mailing" of service is sufficient. Rule 15(c). Here however, service on the U.S. Attorney General was mailed on September 22, 1987, and service was delivered on September 28, 1987; both events falling outside the limitations period. Likewise, service on the U.S. Attorney was late (mailed on September 30, delivered on October 2). Accordingly, appellant's service upon neither the U.S. Attorney nor the U.S. Attorney General was sufficient to satisfy Rule 15(c).

Next, appellant argues that the notice served upon the local postmaster should be imputed to the Postmaster General through the "identity of interests exception." [Appellant's brief at 3.] Under this exception, where recognized, notice is imputed to a

"subsequently named and sufficiently related party" when the complaint is timely filed and notice is given to the party named in the complaint within the limitations period. Schiavone, 477 U.S. at 29. This circuit has recognized that "[R]ule 15(c) is an explicit statement of the procedures and safeguards that make up [the identity-of-interests] exception." Johnson, 861 F.2d at 1481. Thus, assuming some notice can be imputed to the Postmaster General, that notice must still satisfy the Schiavone factors in order to pass Rule 15(c) muster.

The only person who received any notice of appellant's legal action within the limitations period was the local postmaster. The local postmaster received only a summons; he did not

receive a copy of the complaint. In order to render effective service, Fed. R. Civ. P. 4(d) requires that a summons be accompanied by a copy of the complaint. Without a copy of the complaint, the local postmaster would not have had sufficient notice of the substance of the civil action. Thus, even if this defective notice can be imputed to the Postmaster General, the Postmaster General cannot be said to have received notice within the limitations period such that he would not be prejudiced in maintaining his defense. Additionally, the Postmaster General could not have known within the limitations period from the local postmaster's receipt of the civil summons that, but for a mistake concerning identity, the action would

have been brought against him. Accordingly, in our opinion, whatever notice can be imputed to the Postmaster General from the local postmaster's receipt of the summons is insufficient for purposes of establishing the second, third and fourth factors of the Schiavone test.

Finally, appellant argues that the district court erred in disallowing an equitable tolling of the limitations period. This circuit has recognized that an equitable tolling of the limitations period may be appropriate in the context of a discrimination case. Johnson, 861 F.2d at 1480-81. However, a Title VII time limit will be tolled only if there has been "active deception." Id. at 1481. Here, as the district court noted, instead of being misled or deceived or

lulled into inaction, appellant was specifically instructed on the party and timing requirements of § 2000e-16(c) through the EEOC's "Notice of Right to File a Civil Action" attached to the EEOC decision. [R., EEOC Decision at 3.] Accordingly, we affirm the district court's denial of an equitable tolling of the limitations period.

The order of the district court is **AFFIRMED.**

Entered for the Court:

WADE BRORBY
United States Circuit Judge